

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

AGL Resources Nicor Inc., and)	
Northern Illinois Gas Company)	
d/b/a Nicor Gas Company)	
)	Docket No. 11-0046
Application for Approval of a Reorganization)	
Pursuant to Section 7-204 of the Illinois)	
Public Utilities Act)	

**INITIAL BRIEF OF
THE PEOPLE OF THE STATE OF ILLINOIS
AND
THE CITIZENS UTILITY BOARD
REGARDING OPERATING AGREEMENT ISSUES**

JUNE 20, 2011

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Pursuant to Section 200.800 of the Rules of Practice of the Illinois Commerce Commission (“Commission” or “ICC”), 83 Ill. Admin. Code 200.830, and the briefing schedule established by the Administrative Law Judge (“ALJ”), the People of the State of Illinois, through Lisa Madigan, Attorney General of the State of Illinois, (“AG”) and the Citizens Utility Board (“CUB”), through its attorney, hereby submit their Initial Brief in the above-captioned docket. This proceeding was initiated by Northern Illinois Gas Company d/b/a Nicor Gas Company (“Nicor Gas”) and AGL Resources Inc. (“AGL”), (together, “Joint Applicants” or “JA”), to attain the necessary Illinois Commerce Commission approval under Article VII of the Public Utilities Act (“PUA”), (220 ILCS 5/7-204), for the proposed merger between Nicor Inc., Nicor Gas’ parent company, and AGL. This Initial Brief will address only the issues previously addressed in Docket 09-0301, relating to the Joint Applicants’ Operating Agreement, or what is referred to as the “OA” issues.

I. INTRODUCTION AND STATEMENT OF THE CASE

A. The Operating Agreement and Docket No. 09-0301

In Docket No. 08-0363¹, the Illinois Commerce Commission Staff (“Staff”) proposed that the Commission open an investigation to address transactions between Northern Illinois Gas Company d/b/a Nicor Gas Company (“Nicor Gas” or “the Company”) and its affiliates. Staff Witness David Sackett recommended that the investigation should include an analysis of the affiliate relationship between Nicor Gas and its affiliates in the delivery and promotion of Gas Line Comfort Guard (“GLCG” or “Comfort Guard”, a product offered by Nicor Energy Services Company (“Nicor Services”), an affiliate of Nicor Gas, and “if it is determined that the utility provides this service at all, it should be provided at regulated rates.” ICC Docket No. 08-0363, Staff Ex. 24. at 551.

Despite it being an affiliate product, Nicor Gas provides both the marketing and actual repair service associated with GLCG. For a payment of \$4.95 per month, GLCG covers the cost of inspections and repairs related to gas leaks “inside the home,” up to \$600 per incident for customers who sign up for this service. In this context, “inside the home” means on the customer’s side of the meter, as customers are responsible for repairs on their side of the meter, and Nicor Gas is responsible for repairs on its side of the meter. Customer facilities covered by GLCG include exposed piping, shut-off valves, and replacement of brass connectors (response to Staff Data Request DAS 2.17). Based on the charges to Nicor Services for billing services,

¹ Northern Illinois Gas Company, d/b/a Nicor Gas Company – Proposed general increase in delivery service rates, ICC Docket No. 08-0363.

approximately 440,000 Nicor Gas customers subscribed to GLCG in 2009². This represents about 20% of all Nicor Gas residential customers.

Pursuant to the Commission Order in Docket No. 08-0363, the Company filed a petition in 2009 for re-approval by the Commission of an Operating Agreement among Nicor Gas, Nicor Inc., and other participating Nicor Inc. subsidiaries. Under Section 7-101(3) of the Public Utilities Act (“the Act”), the Commission shall review all contractual arrangements between a regulated utility and its affiliates and “(n)o management, construction, engineering, supply, financial or similar contract and no contract or arrangement for the purchase, sale, lease or exchange of any property or for the furnishing of any service, property or thing, hereafter made with any affiliated interest, as hereinbefore defined, shall be effective unless it has first been filed with and consented to by the Commission... .” 220 ILCS 5/7-101(3). In addition, the Commission may condition approval of an affiliate agreement “in such manner as it may deem necessary to safeguard the public interest.” *Id.* Likewise, after investigation and a hearing, that any such contract or arrangement is not in the public interest, the Commission may disapprove an affiliate contract or arrangement if it concludes that any such contract is not in the public interest. *Id.*

In Docket No. 09-0301, witnesses for both the Commission Staff and AG/CUB evaluated the agreement and, in particular, the relationship between Nicor Gas and its affiliate, Nicor Energy Services Company (“Nicor Services”), in the marketing, pricing and provision of Comfort Guard. Under the current operating agreement, Nicor Gas is authorized to provide customer solicitation, billing, and repair services to Nicor Services for GLCG within the Nicor Gas service territory. As a result, Nicor Gas employees currently market, promote and are sent

² Based on the responses to Staff Data Requests DAS 3.01 (Exhibit 2) and DAS 1.12, the average charge to Nicor Services per month for GLCG billing services was \$73,640 at a rate of \$0.167 per bill, indicating an average of 440,958 GLCG customers in 2009.

to customer residences for the delivery of GLCG services on behalf of the affiliate, Nicor Energy Services, Inc. Nicor Ex. 2.0 at 26.

Following their review of Company data, both Staff witness David Sackett and AG/CUB witness David J. Effron filed testimony that concluded that (1) GLCG is not a “legitimately necessary service”; (2) GLCG is significantly overpriced; (3) the marketing of GLCG by Nicor Gas is misleading; (4) Nicor Gas’ sales solicitation service provide Nicor Services with an unfair competitive advantage for its non-regulated products and (4) the affiliate Nicor Energy Services is unreasonably benefiting from its relationship with Nicor Gas, to the detriment of Nicor Gas ratepayers. AG/CUB Ex. 1.0 at 4. Mr. Sackett similarly concluded that 1) GLCG is marketed based on a customer’s fear of having his/her gas supply cut off and a false premise furthered both by Nicor Gas and its affiliate Nicor Services that GLCG is required to prevent shut-offs in gas supply when leaks exposed inside piping are discovered; 2) Nicor Gas provides resources to Nicor Services that allow it to provide a service which avoids customer cutoff; 3) Nicor Gas facilitates access of Nicor Services to Nicor Gas customers most likely to be susceptible to Nicor Services’ marketing; and 4) Nicor Gas provides services that allow Nicor Services to charge for GLCG at much higher prices than Nicor Gas would be allowed to charge for the same product. Staff Ex. 2.0 at 20.

Both AG/CUB and Staff witnesses recommended that the Commission order significant modifications to the marketing, pricing, and regulatory treatment of GLCG as conditions for approval of the Operating Agreement. Mr. Effron urged the Commission to either prohibit Nicor Gas employees from soliciting customers for GLCG on behalf of Nicor Services *or*, if the Nicor Gas employees are permitted to be associated with the provision of GLCG, then the Commission should (1) treat GLCG as a utility service with its price based on cost of service and significantly

lower its price, and (2) require Nicor Gas employees to more fully disclose to customers at the time of marketing the service certain facts related to GLCG. As alternatives to treating GLCG as a utility service with its price based on cost of service, Mr. Effron testified that either the GLCG margin could be treated as a credit to the Nicor Gas utility revenue requirement, or Nicor Services should be required to pay a royalty to Nicor Gas as compensation for the competitive advantage attributable to participation by Nicor Gas and its employees in providing this product. AG/CUB Ex. 1.0 at 18-19.

Similarly, Commission Staff (“Staff”) witness Sackett concluded that is not in the public interest for Nicor Gas to provide the resources to allow Nicor Services to offer GLCG, and testified that Nicor Gas should be precluded from doing so. He urges the Commission to make several conclusions related to GLCG: 1) Nicor Gas’ OA should preclude customer solicitation; 2) require Nicor Gas to provide factual information regarding its currently available repair services; 3) change Nicor Gas’ OA to preclude operational services other than those specifically authorized; and 4) change Nicor Gas’ OA to require that *any* Nicor Gas service, excluding “corporate support,” that supports *any* affiliate product that is offered to Nicor Gas ratepayers be provided to non-affiliates on a non-discriminatory basis. Staff Ex. 2.0 at 5-6.

In addition to recommending his recommendations regarding GLCG, Staff witness Sackett made recommendations regarding Nicor Gas’ call center and website hosting. Specifically, he recommended that Nicor Gas 1) change its OA to require that any Nicor Gas service, excluding corporate support, that supports any affiliate product that is offered to Nicor Gas customers be provided to non-affiliates on a non-discriminatory basis; 2) change Nicor Gas’ OA to preclude website hosting of Nicor Gas by any affiliate; 3) require Nicor Gas to charge any affiliate the same charge as other third parties under the Third Party Billing Service; and 4)

change Nicor Gas' OA to require Commission approval of any sub-agreement prior to it becoming effective. Staff Ex. 2.0 at 5-6, LL. 100-114.

Staff witness Hatthorn also recommended several other changes to provisions in the Company's OA:

- 1) Broaden the Definition of Prevailing Price,
- 2) Require Nicor Gas to Pay to its Affiliates the Lower of Cost or Market for its transactions with its Affiliates,
- 3) Require Nicor Gas to be Paid by its Affiliates the Higher of Cost or Market for its transaction with its Affiliates,
- 4) Require Annual Internal Audit,
- 5) Require Disclosure of Sub-Agreements,
- 6) Require Filing of Executed Operating Agreement on e-Docket,
- 7) Remove Phrase "including, without limitation," and Other Non-Descriptive Phrases
- 8) Remove Language Allowing Nicor Gas' Subsidiaries to Have Separate Agreements,
- 9) Require as an Exhibit to Operating Agreement Actual Allocation Factors, and
- 10) Add a Subsection (d) to Section 5.1 General Principles.

Staff Ex. 1.0 at 2-3, LL. 40-57.

On December 30, 2010, prior to the filing of its Surrebuttal testimony on the Operating Agreement issues, Nicor Gas filed its Motion to Suspend the proceeding in Docket No. 09-0301, arguing that the affiliate issues addressed in that docket would likewise be raised in the Company's soon-to-be filed corporate reorganization approval proceeding, and that the current 09-0301 schedule be suspended until the Motion was considered and ruled upon. Nicor Gas stated that it

anticipated a restructuring of its affiliate arrangements to address interactions with its new parent company and new affiliates as a result of the proposed reorganization.

On January 18, 2011, AGL Resources Inc. (“AGL”), Nicor Inc. (“Nicor”), and Nicor Gas (collectively “Joint Applicants”) filed their application for Commission approval of a corporate reorganization under Section 7-204 of the Act, thereby initiating this docket. 220 ILCS 5/7-204. Under the terms of the proposed reorganization, AGL would become the new corporate parent of Nicor Gas. Included within the reorganization petition is a request for approval of the Joint Applicants’ proposed Operating Agreement, which would replace the agreement that is the subject of Docket No. 09-0301. This new Operating Agreement was filed as Joint Applicants’ Exhibit 6.1. This Agreement and the Operating Agreement that is at issue in Docket No. 09-0301 include the same terms and conditions for the “central management of certain services, the provision to each other of certain services and facilities, and the transfer of certain property” and other transactions between Nicor Gas, AGL and the listed affiliate companies.

Section 7-204(b) provides that no reorganization shall take place without prior Commission approval. 220 ILCS 5/7-204(b). In reviewing any proposed reorganization, the Commission must find that:

- (1) the proposed reorganization will not diminish the utility’s ability to provide adequate, reliable, efficient, safe and least-cost public utility service;
- (2) the proposed reorganization will not result in the unjustified subsidization of non-utility activities by the utility or its customers;
- (3) costs and facilities are fairly and reasonably allocated between utility and non-utility activities in such a manner that the Commission may identify those costs and facilities which are properly included by the utility for ratemaking purposes;
- (4) the proposed reorganization will not significantly impair the utility’s ability to raise necessary capital on reasonable terms or to maintain a reasonable capital structure;
- (5) the utility will remain subject to all applicable laws, regulations, rules, decisions and policies governing the regulation of Illinois public utilities;
- (6) the proposed reorganization is not likely to have a significant adverse effect

on competition in those markets over which the Commission has jurisdiction;
(7) the proposed reorganization is not likely to result in any adverse rate impacts on retail customers.

220 ILCS 5/7-204(b).

On March 24, 2011, the Joint Applicants filed their Request for Administrative Notice in this docket, which requested that the Commission take administrative notice of all data request responses and testimony from ICC Docket No. 09-0301 in this proceeding, as contemplated in a Stipulation signed by the Joint Applicants, Staff, the AG, CUB and the Retail Energy Supply Association (“RESA”). The Joint Applicants argued that Commission adoption of the request would “promote administrative efficiency by limiting the Commission’s consideration of all prospective affiliate and operating agreement issues involving Nicor Gas to one proceeding” and noting that “the operating agreement issues raised in ICC Docket No. 09-0301 comprise a subset of the issues to be addressed in this proceeding pursuant to Section 7-204(b)(2)-(3) of the Act.” Request at 2.

On that same date, Nicor Gas filed a Motion in Docket No. 09-0301 notifying the Commission that Nicor Gas, Staff, the AG, CUB, and RESA had reached agreement that all data request responses served and all testimony filed in the 09-0301 proceeding could be used in ICC Docket No. 11-0046 without objection (as memorialized in a separate stipulation), and that it was anticipated that parties would incorporate the operating agreement issues into their 11-0046 testimonies. Motion at 2-3.

B. The Staff/Joint Applicant Stipulation

On May 20, 2011, the Joint Applicants and Staff submitted to the Commission a Stipulation and draft Operating Agreement (“Agreement”) in this case, Docket No. 11-0046. According to the signatories, the Stipulation “reflects the efforts of the Joint Applicants and Staff to narrow the matters at issue pertaining to the Agreement.” Joint Applicants’ Ex. 7.0 at 1. The

Agreement incorporates language that has been agreed to between the Joint Applicants and Staff, and states that it “resolves all but one issue raised in this proceeding (and in Docket No. 09-0301) relating to the terms and provisions of the Agreement.” *Id.*

The language in the Agreement that remains at issue has been identified in the Draft Operating Agreement attached to the Joint Applicants/Staff stipulation. Joint Applicants Ex. 7.1. Specifically, Section 2.2(e) of the Agreement includes language from both the Joint Applicants and Staff regarding their prospective proposals. According to the Stipulation, the Joint Applicants endorse the underlined language in the Agreement, and it is Staff’s position that the underlined language, which would permit Nicor Gas to continue to market Comfort Guard, should be removed from the Agreement. AG/CUB support Staff’s position that Nicor Gas not be permitted to market in any way GLCG. Staff’s language protects consumers against the anti-competitive, misleading nature of Nicor Gas’ GLCG sales pitch by precluding Nicor Gas CSRs from switching a utility customer to Nicor’s affiliate (IBT) to be pitched GLCG. Staff recognizes that the misleading nature of the Nicor Gas CSR scripts would not be overcome simply by switching that customer to a CSR of an affiliate (in this case, IBT Solutions, which is a wholly-owned subsidiary of Nicor Services that uses its call center to serve Nicor Gas on behalf of Nicor Services). Even with Nicor Gas’ proposed script changes, which purport to inform the customer that the utility portion of the call has ended, the same misleading marketing problems exist.

The Stipulation and attached Agreement were entered into the evidentiary record of this docket on May 23, 2011. Under the terms of the Stipulation, Nicor Gas employees will no longer be providing repair services to Nicor Energy Services related to Gas Line Comfort Guard. Tr. at 167. Proviso B of Section 2.2(e) of the Operating Agreement, according to the Joint Applicants’ counsel, addresses the issues raised regarding billing that product on Nicor Gas bill. That

proviso, according to Joint Applicants' counsel, reflects the agreement that, subject to certain conditions, Nicor Gas would bill for similar GLCG products that are offered by Customer Select suppliers. Tr. at 167-168.

Assuming Commission adoption of those agreed-upon provisions of the Operating Agreement reflected in the Stipulation, what remains at issue for purposes of GLCG and Nicor Gas' involvement in the provision of that product is the issue of whether Nicor Gas should be permitted to continue to market GLCG. For all of the reasons discussed below, the People of the State of Illinois and the Citizens Utility Board urge the Commission to order Nicor Gas to modify the Operating Agreement at issue to eliminate any involvement by Nicor Gas in the marketing and provision of Comfort Guard service, as well as any solicitation of Nicor Gas customers by an affiliate (IBT) related to GLCG. In addition, Nicor Gas should be required to inform existing customers of certain facts about GLCG service, identified above in this Brief, that would provide them with the facts and data that would allow them to make an informed decision on whether to enroll in GLCG, and misleading statements like those described above, should be prohibited. Current enrollments in GLCG should be terminated unless the customer affirmatively elects to continue the service after the aforementioned factual disclosure by Nicor Gas. In addition, once a customer enrolls in GLCG, a written statement should be mailed with the required disclosures. Customers could choose to re-enroll through whatever alternative channels the service was offered.

Should the Commission permit Nicor Gas to continue to provide GLCG services in any form, including marketing, then the Commission should (1) treat GLCG as a utility service with its price based on cost of service and significantly lower its price, and (2) require Nicor Gas employees to more fully disclose to customers at the time of marketing the service certain facts related to GLCG, as discussed above. As alternatives to treating GLCG as a utility service with its

price based on cost of service, the GLCG margin could be treated as a credit to the Nicor Gas utility revenue requirement, or Nicor Services should be required to pay a royalty to Nicor Gas as compensation for the competitive advantage attributable to participation by Nicor Gas and its employees in providing this product.

III. ARGUMENT

A. Nicor Affiliate Nicor Services is Unreasonably Benefitting From its Relationship with Nicor Gas as a Result of the Marketing and Provision of Comfort Guard by Nicor Gas Employees.

Nicor Gas is materially involved in providing GLCG service to Illinois ratepayers. AG/CUB Ex. 1.0 at 4; Nicor Gas Ex. 2.0 at 26. Testimony submitted by both AG/CUB witness Effron and Staff witness David Reardon provided uncontroverted evidence that showed that Nicor Services is unreasonably benefitting from Nicor Gas' provision of marketing and all repair services associated with GLCG. While the Joint Applicants have agreed to end the practice of Nicor Gas employees providing repair services to Nicor Energy Services related to Gas Line Comfort Guard (Tr. at 167), the Operating Agreement that is the subject of this docket presently permits the continued marketing of GLCG in its current form. The record evidence supports a Commission modification to the Operating Agreement that prohibits Nicor Gas employees from engaging in *any* activity associated with the delivery of GLCG, including the marketing of that service.

After reviewing evidence produced by Nicor Gas, AG/CUB witness Effron concluded that Nicor Services is unreasonably benefitting from its relationship with Nicor Gas, to the detriment of Nicor Gas ratepayers. Nicor Gas has provided no substantive evidence that GLCG is properly priced or legitimately necessary, and GLCG is promoted to Nicor Gas customers in a misleading manner. AG/CUB Ex. 1.0 at 4. If Nicor Gas is allowed to continue its association with

GLCG, then any Commission approval of the Operating Agreement should be conditioned on modifications to the marketing and regulatory treatment of GLCG beyond the modifications agreed to by the Joint Applicants and Staff. Either Nicor Gas employees should be prohibited from soliciting customers for GLCG on behalf of Nicor Services or, if the Nicor Gas employees are permitted to be associated with the provision of GLCG, then 1) GLCG should be treated as a utility service with its price based on cost of service *and* 2) Nicor Gas employees should be required to fully disclose material facts concerning the costs and benefits of GLCG to those utility customers they solicit. *Id.* As alternatives to treating GLCG as a utility service with its price based on cost of service, either the GLCG margin could be treated as a credit to the Nicor Gas utility revenue requirement, or Nicor Services could be required to pay a royalty to Nicor Gas as compensation for the competitive advantage to Nicor Services created by the participation of Nicor Gas in the provision of this product. *Id.*

1. Nicor Gas Customers are Unfairly Subsidizing the Provision of GLCG, to the Benefit of Nicor Inc. Shareholders, as a Result of the Relationship Between Nicor Gas and its Affiliate.

In order to put the recommendations of both Staff and AG/CUB witnesses regarding Nicor Gas' involvement in the provision of GLCG in context, an understanding of how the service is marketed and delivered is essential. There is uncontroverted evidence that Nicor Gas employees perform all of the "inside the home" repairs and inspections for Nicor Gas customers participating in the GLCG program. In 2009, Nicor Gas field employees performed 98% of the inspections and repairs for Nicor Gas customers participating in the GLCG program (response to Staff Data Request DAS 2.02). AG/CUB Ex. 1.0 at 5. Nicor Services reimburses Nicor Gas for making repairs, based on cost. Currently, the monthly GLCG fee is included in the monthly bill rendered

by Nicor Gas to its customers on behalf of Nicor Services. Here, too, Nicor Services reimburses Nicor Gas for these billing services based on cost. *Id.* at 6.

In addition to the actual in-home inspections and repairs, Nicor Gas service representatives solicit Nicor Gas customers for GLCG on behalf of Nicor Services. Again, Nicor Services reimburses Nicor Gas based on cost, including the cost of incentives paid to customer service representatives for successfully enrolling customers in GLCG. *Id.*

Both Staff witness Sackett and AG/CUB witness Effron concluded that GLCG is a highly profitable product for Nicor Gas affiliate, Nicor Services, based on estimated annual revenues³ and identified expenses. The results of operations in 2008 and 2009 based on the estimated revenues from sales of GLCG to Nicor Gas customers and the GLCG related expenses allocated from Nicor Gas to Nicor Services showed an extraordinary profit margin of 94.1% in 2008 and 93.5% in 2009:

	(\$000)	
	2008	2009
Revenues (Estimated)	\$24,813	\$26,193
<u>Identified Expenses:</u>		
Inspection and Repairs	576	509
Sales Presentation (Incentives)	154	125
Other Call Center	118	114
Billing Services	<u>613</u>	<u>944</u>
Total Identified Expenses	1,461	1,691
 Pre-Tax Profit	 <u>\$23,352</u>	 <u>\$ 24,502</u>
 Pre-Tax Profit Margin	 94.1%	 93.5%

AG/CUB Ex. 1.0 at 6-7; Staff Ex. 2.0 at 48-50. The expenses in the above table include only those expenses that were billed to Nicor Services from Nicor Gas, as the Company has declined to provide information regarding the amount of other expenses that Nicor Services might incur in

³ With 417,222 GLCG customers in 2008 (using the same estimating method) and 440,958 GLCG customers in 2009, the annual GLCG revenues from Nicor Gas customers would be \$24,813,000 and \$26,193,000, and respectively.

providing GLCG to Nicor Gas customers. While Nicor Services may incur other expenses, such as general administration costs related to GLCG, there is no evidence that such expenses are material.

Id. The above expenses include the costs of actual repairs, sales and promotional expenses, and the cost of billing customers for GLCG. These would appear to be the major functions associated with GLCG, and no other significant expenses have been identified. *Id.* Mr. Effron pointed out that in 2008 and 2009, GLCG revenues from Nicor Gas customers were in excess of \$2 million per month, while the actual expenses incurred for repairs were less than \$50,000 per month. *Id.* at 7-8.

Nicor Gas witness Gerald O'Connor agreed that in order to calculate the profitability of the GLCG service, the approach adopted by Mr. Effron would derive such an estimate. Tr. at 197. He testified that he was not challenging either Mr. Effron's calculation of the GLCG revenues or the expenses listed in the AG/CUB testimony. Tr. at 198. In his rebuttal testimony, however, Mr. O'Connor took issue with the 93-94% profitability claims by Mr. Effron, arguing that the affiliate Nicor Services has incurred expenses not considered by Mr. Effron regarding "the types of work performed by Nicor Services to support GLCG.. ." Nicor Gas Ex. 2.0 at 53. However, no Nicor witness, including Mr. O'Connor, provided any kind of specific cost data, despite discovery requests for such data. Tr. at 202; AG/CUB Ex. 2.0 at 2. In fact, Mr. O'Connor testified that (1) he has not reviewed the cost and revenue data of the other products and services provided by Nicor Energy Services; and (2) that he has not reviewed the cost and revenue data of Nicor Energy affiliate services. Tr. at 203. Accordingly, his opinion as to the inaccuracy of Mr. Effron's conclusion about the profitability of GLCG, based on the notion that Nicor Energy Services incurs other costs than those listed by Mr. Effron, rings hollow. Moreover, as noted by Mr. Effron, the "types of work performed by Nicor Services to support GLCG" (other than those billed from Nicor Gas) were identified as: product development, pricing, construct and maintain information

systems, develop customer terms and conditions, sales channel information systems, develop customer terms and conditions, sales channel remittance, credit/collection, Department of Insurance and consumer protection compliance, risk profile/assessment, legal and national expansion. AG/CUB Ex. 2.0 at 3, citing Nicor response to AG Data Request 2.05. The Company has not provided any evidence that these expenses are either material or relevant to the provision of GLCG to Nicor Gas customers.

Information regarding the headcount of Nicor Services, the total payroll costs and the total assets employed is simply not relevant to an analysis of the profitability of GLCG. Had Mr. Effron been analyzing the profitability of the affiliate Nicor Services as a whole, it would be necessary to take such information into account. However, that was not the purpose of the Effron analysis.

Thus, contrary to Mr. O'Connor's claims, Mr. Effron did not ignore that information in his analysis. He did not incorporate the Nicor Services expenses (other than those billed from Nicor Gas) into his analysis either because there is no evidence that those other expenses are material or because they are not relevant to the profitability of GLCG provided to Nicor Gas customers. *Id.*

Mr. O'Connor also opined that both Mr. Effron and Mr. Sackett "chose to ignore or failed to consider" the detailed financial data provided in the 2009 Nicor Inc. Form 10-K. Nicor Gas Ex. 2.0 at 53. This is likewise a strawman argument. In his rebuttal testimony, Mr. Effron testified that he had reviewed at the time he filed his direct testimony the 2008 Nicor Inc. Form 10-K, which includes financial information on "Other energy ventures", including Nicor Services. AG/CUB Ex. 2.0 at 5. He stated that no financial information regarding GLCG is provided therein. In preparation for the filing of his rebuttal testimony, Mr. Effron stated that he reviewed the 2009 Nicor Inc Form 10-K. That, too, included no financial information regarding GLCG. *Id.*

Accordingly, the notion that the Effron/Sackett financial analysis of GLCG ignored important financial data regarding the profitability of GLCG is a hollow argument.

Nicor Gas employees promote GLCG and make necessary repairs, and Nicor Gas bills customers for GLCG. The affiliation of Nicor Services with Nicor Gas provides instant access to the millions of customers in the Nicor Gas service territory. The pre-tax profit margins on GLCG described above, as well as the market share analysis of Mr. Sackett discussed below, indicate that the product is not really subject to any substantive competition, as it would not be possible to sustain such margins over time if competitive suppliers were able to gain access to the market for the product. AG/CUB Ex. 1.0 at 8-9. Although Nicor Gas solicits customers, makes the actual repairs, and bills the customers, GLCG is treated as a non-utility product offered by Nicor Services, an affiliate of Nicor Gas. Thus, all of the GLCG revenues in excess of expenses go to Nicor Services, and ultimately to Nicor, Inc. shareholders rather than going to reduce the utility revenue requirement of Nicor Gas.

The customer solicitations on behalf of Nicor Services emphasize the role of Nicor Gas in the provision of GLCG service in a way that a competitor could not. Appendix A to this Brief (AG/CUB Ex. 1.1) is a copy of the first three pages of Exhibit 1 to the responses to Staff Data Request DAS 2.06, which contain the scripts used by Nicor Gas call center employees to promote GLCG to Nicor Gas customers.

2. Nicor Gas' GLCG Marketing Materials are Misleading.

Solicitations are made to Nicor Gas customers (or soon-to-be customers) on calls initiated by the customers. As explained in the testimony of AG/CUB witness Effron, Nicor Gas GLCG scripts emphasize the role of Nicor Gas in providing GLCG. The scripts make a point of stating that any repairs will be made by a “certified Nicor technician” and that the \$4.95 monthly cost of

the program will be “conveniently added to your Nicor Gas bill.” AG/CUB Ex. 1.0 at 10. In addition, the scripts, especially in the “rebuttals” to customers who do not immediately agree to sign up, create the distinct, but misleading, impression that without GLCG the Nicor technicians will not repair gas leaks. *Id.*

For example, if a caller expresses lack of interest in the program, the call center employee cautions the caller to remember that when a customer calls the gas company when there is a gas leak emergency:

... the utility is only legally responsible to make the situation safe or make repairs to its own facilities. What that means is that the property owner (such as yourself) may have to find and hire an independent contractor to come in, do an inspection, and then make the repairs. That can be expensive, and it could also mean days without any gas to heat the home, cook, and so on.

Now when you enroll in the Gas Line Comfort Program today, you won't have to worry about any of that: If you ever have a gas leak, all you'll do is make one call to the utility, day or night, even on weekends and holidays. A certified, Nicor technician will come out, typically within one hour, and make repairs up to \$600 per incident.

Id. (See Appendix A to this Brief). The call center employee does not actually say that the Nicor technician won't perform the inspections and make any necessary repairs if the customer is not enrolled in the GLCG program. However, by stating that without GLCG the customer may have to find and hire an independent contractor to perform an inspection and make repairs, but that by enrolling in GLCG the customer “won't have to worry about any of that,” the intent is obviously to create the impression that customers who aren't enrolled in GLCG are on their own in the event of a gas leak. *Id.* at 10-11.

The scripted “rebuttal” to a customer willing to assume responsibility for a suspected leak is intended to create the same impression:

You know, what a lot of people really like about this program is that if they do have a gas leak emergency at some odd hour of the day or night,

they won't have to try to make the repair themselves or call an independent contractor to come out and do the work. All they'll have to do is make just one call to the utility, day or night, even on weekends and holidays. A certified Nicor Technician will then come out within an hour and often make the repair on the spot, up to \$600 per incident—typically at no additional cost to them.

Since gas leaks have the potential to be catastrophic, some people ... simply feel more secure knowing that a Nicor technician, with specialized training and equipment will be performing the work.

Id. (See Appendix A to this Brief.) Again, there is no explicit statement that the Nicor technician will make the necessary repairs only if the customer is enrolled in GLCG. However, by implying that with GLCG customers avoid the necessity of having to make the repairs themselves or to find someone to make the repairs but won't have to do so with GLCG, that is clearly the impression that is created. The script does not explain to customers that even if they are not enrolled in Comfort Guard, the Nicor technician responding to the call would be available to make any necessary repairs. *Id.* Nicor witness Gerald O'Connor testified, too, that the Stipulation agreed to by the Joint Applicants and Staff in no way modifies these misleading scripts. Tr. at 195.

This impression is also fostered in other media. The Nicor web site has a GLCG page. Customers referring to the GLCG page⁴ are informed that:

The gas utility has always found and fixed leaks detected outside your home. But did you know that inside your home, once gas has been safely turned off by the utility, it's always been your responsibility to call a contractor, arrange to get the leak repaired and then call the utility to get your gas turned back on?

With Gas Line ComfortGuard, it's a whole new day. Now, Nicor Services will make repairs, cover the cost of any repair material and labor, and guarantee the work is done correctly.

Id. at 12. This text makes no allowance for the possibility that Nicor field technicians will be available to make the necessary repairs, regardless of whether the customer has subscribed to the GLCG service. According to counsel for Joint Applicants, under the stipulation agreed to

⁴ http://www.nicor.com/en_us/nicor_services/protection_solutions/gas_line.htm

between Staff and the Joint Applicants, there would be no marketing of GLCG or other affiliate products on the Nicor Gas website. Instead, the site would only link to its parent company, AGL Resources. Joint Applicants' Ex. 6.1. The Commission should ensure that this commitment is adopted in the final Operating Agreement approved in this docket.

Nicor Gas' creates the impression that unless the customer subscribes to GLCG, they will have to find a contractor on their own to fix any suspected leak inside the home. This impression is misleading because the Nicor Gas field technicians, do, in fact, repair gas leaks inside the home for customers not enrolled in GLCG. As noted in the response to Staff Data Request 3.03, if the Nicor field technician determines that a customer not enrolled in GLCG is in need of repair services then, pursuant to Nicor Gas standard practices "the customer is informed at the time of the field visit that either Nicor Gas or a qualified contractor may be hired to make a repair." AG/CUB Ex. 1.0 at 12. A customer not enrolled in GLCG will be charged a "non-program" fee based on the time and materials needed to complete the repair. *Id.*

As pointed out by Mr. Effron, it would, in fact, be unreasonable for Nicor field technicians to refuse to repair leaks for customers not enrolled in GLCG. A policy of refusing to allow its qualified field technicians to repair leaks for customers not enrolled in GLCG would be inconsistent with the Company's obligation as a regulated utility to provide safe and reliable service. *See, e. g.* 220 ILCS 5/8-101.

In response to Mr. Effron's and Mr. Sackett's criticisms of the Nicor Gas and Nicor affiliate marketing of GLCG, Mr. O'Connor points to relatively low numbers of customer complaints received by the Commission, CUB and the AG regarding the Comfort Guard service. Nicor Gas Ex. 2.0 at 40. This point, however, is of little value to the Commission's analysis of the Company's marketing efforts. As pointed out by Mr. Effron, customers need complete and

accurate information about a product in order to make informed judgments about a product. AG/CUB Ex. 2.0 at 6. If customers lack the information necessary to evaluate the price of a product in relation to its true value, they are unlikely to register complaints about that product. *Id.* at 7. Accordingly, the relatively low number of complaints is not evidence that the price of GLCG is reasonable in relation to its real value or that the solicitations are complete and accurate.

Given the nature of the GLCG product, the way that it is promoted, marketed, and priced, and the treatment of its profits, the present Operating Agreement between Nicor Gas and Nicor Services with regard to GLCG is inappropriate, unreasonable, and not in the public interest.

B. Section 7-101 and 7-204 of the Act Authorizes the Commission to Condition Approval of the Operating Agreement on Ending Nicor Gas' Marketing and Involvement with GLCG.

The Commission has the authority under Section 7-101 of the Public Utilities Act to condition approval of an affiliate services contract, such as the Operating Agreement, in such a manner as it may deem necessary to safeguard the public interest. 220 ILCS 5/7-101. Under Section 7-101(3) of the Public Utilities Act ("the Act"), the Commission shall review all contractual arrangements between a regulated utility and its affiliates. 220 ILCS 5/7-101(3). The Commission may condition approval of an affiliate agreement "in such manner as it may deem necessary to safeguard the public interest." *Id.* Likewise, after investigation and a hearing, that any such contract or arrangement is not in the public interest, the Commission may disapprove an affiliate contract or arrangement if it concludes that any such contract is not in the public interest. *Id.*

There is Commission precedent for such action. In Docket No. 02-0517, Illinois American Water Company ("IAWC") sought approval from the Commission for an amended affiliate agreement pursuant to which IAWC would provide certain limited services to its affiliate

American Water Resources, Inc. (“AWR”) in conjunction with AWR’s offering a water line protection program (“WLPP”) to IAWC customers. The anticipated WLPP was similar to GLCG, in that AWR would cover up to a certain dollar value (in this instance, \$3000) per occurrence for the repair of leaks resulting from normal wear and tear in the customer-owned portion of the water line.

In its conclusion on this matter, the Commission noted that it was “troubled by the lack of any analysis justifying the offering of the WLPP to Illinois rate payers” (Docket No. 02-0517, Order on Reopening, page 16). The Commission went on to state that:

In the absence of any substantive evidence demonstrating that the WLPP is properly priced or is even legitimately necessary, it is not in the public interest to allow IAWC to lend its name and assistance in marketing the WLPP to Illinois rate payers.

Id. The Commission concluded that “the WLPP has not been shown to be in the public interest and will not be approved.” *Id.*

Likewise in this case, no substantive evidence has been presented that GLCG, which is provided pursuant to an affiliate services contract, is properly priced or legitimately necessary. Absent modification to the GLCG program, the Commission should prohibit Nicor Gas from lending its name and assistance in marketing and providing GLCG to Illinois ratepayers. GLCG service should also be terminated for customers presently enrolled, with a full explanation of why; and those customers could choose to re-enroll through whatever alternative channels the service was offered.

Nicor failed to provide any evidence that GLCG is reasonably priced. Mr. Effron pointed out that in Staff Data Request DAS 2.05, the Company was asked to provide an economic analysis showing that GLCG (and other products solicited on behalf of Nicor Gas affiliates) is properly priced so as not to overcharge Nicor Gas customers. AG/CUB Ex. 1.0 at 15. The Company

objected and declined to provide such an analysis. While the Commission did not specifically state what the standards for proper pricing would be in Docket No. 02-0517, Mr. Effron testified that the fact that Nicor Services takes in over \$2 million per month in GLCG charges to Illinois ratepayers but spends less than \$50,000 per month on actual repairs (under \$0.10 per GLCG per customer per month) and realizes pre-tax profit margins in excess of 90% would indicate that it is not properly priced. *Id.* at 16.

Moreover, like the waterline insurance product IAWC was offering, GLCG is not “legitimately necessary.” Mr. Effron testified that he has seen no evidence that Nicor Gas customers were at any great risk before GLCG was available, that Nicor Gas customers without GLCG are somehow disadvantaged, or that customers of gas distribution companies where GLCG (or a similar product) is not available are in any way deprived. Today, customers of Nicor Gas will have gas leaks repaired, by Nicor Gas field technicians if they so choose, regardless of whether they are enrolled in GLCG.

Moreover, GLCG is not necessary to avoid catastrophic costs. Based on the responses to AG Data Requests 3.05 and 3.11 (attached to Mr. Effron’s testimony as AG/CUB Exhibits 1.2 and 1.3), only 63 of nearly 12,000 repairs performed by Nicor Gas field technicians in 2009 (GLCG and non-GLCG) had a cost greater than \$200. AG/CUB Ex. 1.0 at 16. Other facts demonstrating the illegitimacy of GLCG were uncontroverted by Nicor Gas. Specifically, the evidence shows:

- Nicor Gas technicians will be available to make any necessary repairs and make them on the spot, irrespective of whether the customer is enrolled in GLCG. Statements or indirect implications that Nicor Gas field technicians will be unavailable to repair inside-the-home gas leaks unless the customer subscribes to GLCG should be prohibited.

- Over the course of 2009, less than 2% of the Nicor Gas customers enrolled in GLCG had repairs performed.
- Approximately three-quarters of gas leak repairs performed by Nicor Gas field technicians for non-GLCG customers in 2009 were under \$50.
- The average cost of repairs performed in 2009 by Nicor field technicians for non-GLCG customers was about \$47.
- Less than 3% of the repairs of gas leaks by Nicor field technicians for non-GLCG customers in 2009 had a cost in excess of \$100.
- The average repair cost per GLCG customer per month in 2009 was less than \$0.10.

AG/CUB Ex. 1.0 at 17.

Staff witness Sackett arrived at nearly identical conclusions regarding the lack of legitimacy, market power and misleading marketing of GLCG. Staff Ex. 2.0, 20-34. Certainly, these facts about the lack of frequency and the minimal expense associated with in-home gasline repairs support the conclusion that GLCG is neither necessary nor appropriately marketed by Nicor Gas employees. The Commission should, as both Staff and AG/CUB witnesses recommend, prohibit Nicor Gas employees from marketing or soliciting subscribers for the Comfort Guard service.

Mr. O'Connor claims that the Commission need not worry itself about the profitability and predominant market share of GLCG, because that product is subject to extensive regulatory oversight by the Illinois Department of Insurance, including consumer protection considerations such as disclosure of contract terms and cancellation rights. Nicor Gas Ex. 2.0 at 56-57. Mr. O'Connor, however, does not and cannot make the argument that this oversight pre-empts the Commission's authority under the PUA to condition a utility's affiliate operating agreement to

ensure such agreement safeguard's the public interest. 220 ILCS 5/7-101(3). This authority is exclusively with the Commission's authority and indeed the Commission has an obligation under the PUA to ensure any OA it approves safeguards the public interest.

C. No Competitive Market Exists for GLCG

Mr. Effron and Staff witness Sackett each concluded that the market for gas line warranty products is not competitive in Nicor Gas' service territory and as such, GLCG is not priced in a competitive market. AG/CUB Ex. 1.0 at 8-9; Staff Ex. 4.0 at 11. Mr. Sackett testified that Nicor Gas provides resources that allow Nicor Services to provide GLCG at a much higher price than Nicor Gas would be allowed to charge for the same service and gives Nicor Services anti-competitive market power in providing the GLCG product. *Id.* at 64, LL. 1144-1147. Mr. Sackett provided extensive evidence below showing that the price of GLCG is above the competitive level. Specifically, he demonstrated that Nicor Services possesses a dominant market share, has exclusive access to three significant Nicor Gas provided services and enjoys a significant mark up over the actuarial cost of GLCG. Staff Ex. 2.0 at 44-46.

In response to these arguments, the Company argued that several similar services existed in the marketplace. In detailing these supposed competitors to GLCG, however, Nicor Gas was only able to cite two companies that provide similar warranty products to GLCG: The Manchester Group and Santanna Energy Services. Nicor Gas Ex. 4.0 at 25, LL. 607-609. Staff witness Sackett, however, determined that the combined market share of both these companies was fewer than 2,000 customers, as opposed to Nicor Services' over 449,500 customers. Staff Ex. 4.0 at 35-36, LL. 621-643. Importantly, neither of these firms currently markets these products in the Nicor Gas service territory. *See id.* Mr. Sackett, therefore, determined that Nicor Services' market share of gas line warranty products was 99.6%. *Id.* at 36, LL. 641-643. These

facts demonstrate that neither firm constitutes a serious threat to Nicor Services' market share.

Mr. Sackett analyzed the price elasticity of GLCG, the results of which demonstrated that GLCG is highly inelastic, and potential competitors have been driven out of the market or are not actively marketing it. *Id.* at 34, LL. 606-609.

In an incredible attempt to undercut the overwhelming evidence of its affiliate's market dominance for insurance products, the Company claims that it competes with those customer that are "self-insured" – that is, customers who allegedly intentionally abstain from purchasing a warranty product and elect instead to bear the risk of repair costs themselves. *See Nicor Gas Ex. 7.0* at 9-16. Nicor Gas claims that when those customers who are "self-insured" are included in the market share analysis, Nicor Services' market share is closer to a relatively smaller percentage in the Nicor Gas service territory. *Nicor Gas Ex. 7.0* at 3, LL. 56-60. He then claims that this demonstrates that Nicor Services does not possess significant market power in the relevant product market. *Id.* The Company, however, was unable to identify with specificity which customers were "self-insured" as it defined that term. In CUB Cross Ex. 1 (response to CUB 2.04), Mr. Ros acknowledged that he cannot point to a single utility regulation matter involving self insurance and market insurance. And when asked in discovery what percentage of the market he considers to be self-insured, Dr. Ros answered that he does not have all the information necessary to determine the percentage of the market which is self-insured. CUB Cross Ex. 1 (response to CUB 2.02).

Mr. Sackett's price elasticity analysis further found that the existence of "self-insured" or the availability of more extensive warranty plans in the market are not close substitutes for GLCG and should not be included in any market share analysis. *Staff. Ex. 4.0* at 38, LL. 664-669. Mr. Sackett further s found that GLCG has no close substitute as evidenced by the fact that

a change in price leads only to a very small change in quantity demanded. Staff Ex. 4.0 at 39, LL 690-692.

Mr. Ros further supports his theory regarding “self-insurance” by pointing to an econometric demand model, which he concludes shows that self-insurance positively affects the demand for GLCG. Nicor Gas Ex. 7.0 at 15, LL. 316-26. He claims this model shows a “positive relationship” between increased plumbers wages and the number of GLCG customers (represented as a decrease in warranty subscriptions). *Id.* Dr. Ros did not and could not, however, provide evidence that these factors are in any way correlated, let alone causal (he acknowledged in discovery that he “does not have consumer survey evidence to determine whether consumers were aware of plumber wages and relied on that information to choose to purchase GLCG.” CUB Cross Ex. 1 (response to CUB 2.05). Mr. Sackett also disagrees with Nicor witness Ros that self-insurance or other warranty products available in the area were substitute services and he does not believe these should be used to analyze Nicor’s market share. *Id.* at 38, LL. 667-69. Mr. Sackett concluded that Nicor Gas has completely disregarded the issues of discrimination and equal playing fields for competition in its design and implementation of its OA with regard to the offering and marketing of its affiliates’ warranty products. Staff Ex. 2.0 at 10, LL 217-218.

D. If Nicor Gas Employees are Allowed to Continue Soliciting Utility Customers for GLCG, Marketing Materials Should Be Modified to Disclose Critical Facts About GLCG Service and GLCG Should Be Regulated and Repriced to Align With Actual Costs.

Should the Commission opt to continue to allow Nicor Gas employees to market and solicit the purchase of Comfort Guard, the Commission should condition approval of the Operating Agreement on a couple of conditions, in addition to adoption of the Joint Applicants’ commitment to end Nicor Gas employees performance of GLCG repair work and the promised modification to

the Nicor Gas website. Nicor witness O'Connor agreed that in order for a consumer to make a decision as to whether a product makes economic sense or is a good value that it's important that consumers have accurate information about that product or service. Tr. at 206. The current Nicor customer service representative scripts, however, not only fail to provide accurate information about the product that is being sold, they suggest that GLCG is necessary to avoid service disruptions and costly gasline maintenance bills. Nicor witness Agustin Ros agreed that it is possible that a customer would infer from the information provided in the Nicor Gas CSR scripts that that the only way to get a Nicor Gas employee to check for potentially dangerous conditions or repair services inside the home would be to subscribe to GLCG. Tr. at 272.

In order to correct this information imbalance, and ensure that Nicor Gas customers are not being sold an overpriced unnecessary product, the Commission should (1) require Nicor Gas to provide its customers in advance with the facts and data that would allow them to make an informed decision on whether to enroll in GLCG, *including notifying existing Comfort Guard customers of the pertinent facts*, and prohibit the Company from including misleading statements like the ones highlighted above in its marketing materials; and (2) regulate the provision of GLCG and price the service based on its actual costs.

As a condition for approval of the Operating Agreement, the Commission should require Nicor Gas employees to clearly inform the customer that:

- Nicor Gas technicians will be available to make any necessary repairs and make them on the spot, irrespective of whether the customer is enrolled in GLCG. Statements or indirect implications that Nicor Gas field technicians will be unavailable to repair inside-the-home gas leaks unless the customer subscribes to GLCG should be prohibited.

- Over the course of 2009, less than 2% of the Nicor Gas customers enrolled in GLCG had repairs performed.
- Approximately three-quarters of gas leak repairs performed by Nicor Gas field technicians for non-GLCG customers in 2009 were under \$50.
- The average cost of repairs performed in 2009 by Nicor field technicians for non-GLCG customers was about \$47.
- Less than 3% of the repairs of gas leaks by Nicor field technicians for non-GLCG customers in 2009 had a cost in excess of \$100.
- Nicor field technicians for non-GLCG customers in 2009 had a cost in excess of \$100.
- The average repair cost per GLCG customer per month in 2009 was less than \$0.10.

AG/CUB Ex. 1.0 at 17. These disclosures would also have to be made to the customers presently enrolled in GLCG as well, with enrollment being terminated unless the customer affirmatively elects to continue the service. In addition, once a customer enrolls in GLCG, a written statement should be mailed with the required disclosures.

The Commission likewise has the authority under Section 7-101 and 7-204 to treat GLCG as a utility service with its price based on cost. Making personnel available to respond to suspected gas leaks is an integral element of providing safe and reliable gas distribution service. Thus, any program that involves the gas distribution utility in the repair of gas leaks can be deemed to be a function of providing utility service. As such, GLCG service would be subject to regulation by the Commission, including regulation of the price charged for the service. If the Commission sides with the Joint Applicants and continues to allow Nicor Gas employees (and

the affiliate IBT) to market GLCG to Nicor customers, Mr. Effron's proposed modifications to the price of Comfort Guard should be adopted.

In both Docket No. 08-0363 and in the instant docket, Staff Witness Sackett recommended that if it is determined that the utility provides GLCG at all, it should be provided at regulated rates. Staff Ex. 24 at 51. Given that Nicor Gas employees solicit GLCG service on behalf of Nicor Services, Nicor Gas employees perform 98% of the repairs for customers enrolled in GLCG, and the monthly charges for GLCG are included on Nicor Gas bills, Mr. Effron testified that Nicor Gas is, in substance if not in form, the entity that provides GLCG. AG/CUB Ex. 1.0 at 18. In addition, as it would be practically feasible for Nicor Services to market GLCG in its present form absent the affiliation with Nicor Gas and the participation of Nicor Gas in the marketing of this product. *Id.* Based on the available evidence provided by Nicor Gas, Mr. Effron estimated that the price for GLCG would be approximately \$0.30 per month if were treated as a utility service subject to cost based rate regulation. *Id.* at 19.

As alternatives to treating GLCG as a utility service with its price based on cost of service, Mr. Effron recommended that either the GLCG margin could be treated as a credit to the Nicor Gas utility revenue requirement, or Nicor Services could be required to pay a royalty to Nicor Gas as compensation for the competitive advantage to Nicor Services created by the participation of Nicor Gas in the provision of this product. *Id.* at 19. He explained that if the Commission treated the GLCG margin as a credit to the Nicor Gas utility revenue requirement, it would simply include the income from GLCG in the net income from utility operations in the determination of the Company's revenue deficiency (or excess) in the context of a base rate case. The price of the service would not be regulated, but the benefits of any revenues in excess of expenses would go

to the whole body of Nicor Gas customers rather than to Nicor, Inc. shareholders, the current beneficiaries of the existing affiliate arrangement. *Id.*

As an alternative, a royalty payment from Nicor Services to Nicor Gas could be ordered by the Commission. Under this scenario, Nicor Services would pay a royalty to Nicor Gas for lending its name and assistance in the marketing of GLCG to Illinois ratepayers. The royalty would be included as a credit to the base rate revenue requirement in rate cases. Based on the available evidence regarding GLCG profitability and the degree of participation by Nicor Gas employees in marketing GLCG, Mr. Effron recommended that any such royalty be set at least at 90% of GLCG revenues derived from Illinois ratepayers. *Id.*

In response to Mr. Effron's recommendation to treat GLCG as a utility service in terms of pricing or royalty payment, Nicor Gas witness Ros and O'Connor argue that his recommendations are inappropriate because (1) the price Nicor Gas obtains for the support services it provides for GLCG has "no relevance to the profits that Nicor Services may or may not make"; and (2) it amounts to an indirect regulation of the profit of GLCG that would distort market outcomes. Nicor Gas Ex. 2.0 at 66. They argue that "because Nicor Gas charges its fully distributed cost for solicitation services, there is no ratepayer subsidy." *Id.*

These arguments, however, miss the mark. Given the material involvement of Nicor Gas employees in all elements of the provision of the Comfort Guard service, the pricing of the service is a fair subject of inquiry for the Commission. The role Nicor Gas employees play in the provision of the service for Nicor Services, and whether the utility is being properly compensated for that activity, is at the heart of the Commission's duty to oversee affiliate transactions with public utilities, both under Section 7-101 and 7-204 of the Act. The preponderance of the evidence dictates that the Commission take action here and now and (1)

modify the terms of the Operating Agreement; (2) ensure Nicor Gas customers are not being misled by Nicor Gas employees in the marketing of an affiliate service; and (3) ensure that affiliate profits are being subsidized by monopoly utility ratepayers.

III. CONCLUSION

Wherefore, the People of the State of Illinois and the Citizens Utility Board urge the Commission to order Nicor Gas to modify the Operating Agreement at issue to eliminate any involvement by Nicor Gas in the marketing and provision of Comfort Guard service. In addition, Nicor Gas should be required to inform existing customers of certain facts about GLCG service, identified above in this Brief, that would provide them with the facts and data that would allow them to make an informed decision on whether to enroll in GLCG, and misleading statements like those described above, should be prohibited. Current enrollments in GLCG should be terminated unless the customer affirmatively elects to continue the service after the aforementioned factual disclosure by Nicor Gas. In addition, once a customer enrolls in GLCG, a written statement should be mailed with the required disclosures. Customers could choose to re-enroll through whatever alternative channels the service was offered.

Should the Commission permit Nicor Gas to continue to provide GLCG services in any form, including marketing, then the Commission should (1) treat GLCG as a utility service with its price based on cost of service and significantly lower its price, and (2) require Nicor Gas employees to more fully disclose to customers at the time of marketing the service certain facts related to GLCG, as discussed above. As alternatives to treating GLCG as a utility service with its price based on cost of service, the GLCG margin could be treated as a credit to the Nicor Gas utility revenue requirement, or Nicor Services should be required to pay a royalty to Nicor Gas as

compensation for the competitive advantage attributable to participation by Nicor Gas and its employees in providing this product.

Respectfully submitted,

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